'34446-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JEROME C. IVES as Personal Representative of the
Estate of G. Jerome Ives, Respondent

v.

DAVID RAMSDEN and MICHELLE L. RAMSDEN, and the marital
community composed thereof, Appellants

BRIEF OF RESPONDENT
AND
CROSS-APPELLANT

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I. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

A. The trial court erred in concluding (CL 3, CP 69) that David Ramsden's recommendations and sales of four speculative limited partnership investments to G. Jerome Ives were not unsuitable, simply because following each sale Ives still "had sufficient liquidity [from other assets] for his circumstances".

B. The trial court erred in failing to award plaintiff damages for each of the four limited partnership investments listed in Conclusion of Law No. 3.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A. When a securities salesperson in a fiduciary capacity recommends that an elderly person with modest means and little investment experience, whose investment objective is "conservative income", purchase a series of speculative and illiquid limited partnership interests that pay high commissions, do the recommendations nevertheless satisfy the securities industry's Suitability Rule simply because, after the purchase, the investor still has some liquid assets?

B. When a securities salesperson has a fiduciary relationship with an elderly person of modest means, who has little investment experience, whose investment objective is "conservative income", and who reasonably believes the broker is acting for the elderly person's benefit rather than out of self-interest, is it a breach of the broker/adviser's duty of due care and duty of fair dealing to recommend that the elderly person purchase a series of speculative, illiquid, limited partnership interests that pay high commissions to the stockbroker?

C. When a securities salesperson recommends that an investor buy limited partnership investments which, due to their commission costs, are excessive in size or frequency in light of the client's investment objectives and financial and other circumstances, does the salesperson (1) violate the Suitability Rule, (2) a breach his duty of care and duty of fair dealing, and/or (3) violate the Consumer Protection Act?

D. Do the trial court's Findings of Fact support Conclusion of Law No. 3 that four of the limited partnership investments David Ramsden recommended to G. Jerome Ives did not violate the Suitability Rule?

E. In light of Findings of Fact 35 and 37 (re excessive trading), did the trial court err by failing to conclude that Mr. Ramsden breached his duty of due care and fair dealing in recommending and selling the first four limited partnership investments to Mr. Ives?

III. INTRODUCTION

This is an action by Jerry Ives' Estate against the decedent's investment adviser/stockbroker, David Ramsden. Starting in 1989, when

Ives was 75 years old, and continuing through 1995 when he was 82. Ramsden recommended and sold Ives a series of speculative limited partnership interests, and personally borrowed $86,500 from his elderly client with an unsecured promissory note at below-market interest rates.

Ramsden was represented by counsel for about 2 ½ years but by the time of trial his counsel had withdrawn. Ramsden represented himself at trial. When plaintiff presented Findings of Fact and Conclusion of Law for entry, Ramsden engaged new counsel, who represented him during entry of the trial court Judgment and now represents him on this appeal.

IV. STATEMENT OF FACTS

G. Jerome Ives was born in 1913. After high school he attended two years of vocational/technical college training in air conditioning and refrigeration (RP I, 19/16-24). He worked as a refrigeration and air conditioning installer/repairman. RP I, 93/1 – 94/16.

In early 1989 Ives lived in Sequim. He was 75 years old, retired and of very modest means. He lived in a mobile home which he had just bought for $31,900 (Ex. 121; RP I, 119/1-25) and for which he still owed $24,000 (Ex. 121). He had about $21,000 income annually from social security and pensions. Exs. 47, 48.

Ives had only about $105,000 in liquid assets: $102,000 invested in mutual bond funds that paid out income, and $3,000 in a checking account. FF 25, 28 (CP 55).

His other assets were: two vehicles ($10,000; FF 25, CP 55); stamp, coin, gun and "collectible plates" collections (appraised at slightly over $10,000 upon his death); and he was owed about $84,000 by family members to whom he had loaned money. Ex. 113; RP II, 100/13 – 103/10.

David Ramsden has a law degree but never practiced law (FF 2, CP 51-52). He retired as a Los Angeles county employee in 1985 (RP II, 67/24 – 68/3). Shortly thereafter he became licensed as a securities salesperson (referred to as a stockbroker, or "registered representative"). FF 1 (CP 51). In 1987 Ramsden associated with an NASD Member broker-dealer firm as an independent contractor (FF 3, CP 52), and began selling insurance and investment products (RP I, 53/10 – 55/22).

Ramsden moved to Sequim in 1988 (FF 15; CP 53), and started an insurance and securities sales business from scratch (RP I, 62/24 – 63/11), still as an independent contractor associated with the NASD broker-dealer. He joined multiple local fraternal organizations (Elks, Rotary, Lions, VFW, Moose) in order to develop clients. RP I, 63/20 – 64/5. About 50% of his clients were retired people. RP I, 64/6-9.

Ramsden appears to have been in financial distress around this time. On August 31, 1990 First Interstate Bank obtained a $5,711 judgment against him in California. Ex. 128. That judgment was still unpaid as of May 16, 2000 when it was renewed in the increased amount of $11,244 and recorded in Clallam County. Ex. 129.

Ramsden met the elderly Mr. Ives through the Elks. They socialized together and became friends. Ramsden visited Ives' home several times (FF 16, CP 53), and knew that his "assets" included boxes of "collectible plates", and other collections including an "extensive collection" of video tapes. RP 25/3-27/2.

In Findings of Fact which Ramsden does not deny are supported by substantial evidence[1], the court found that Ramsden developed a fiduciary relationship with Ives (FF 22; CP 55) and occupied an unequal bargaining position with him. FF 19 (CP 53). While not totally naïve, Ives was not sophisticated about investments. FF 18 (CP 53) and was justified in expecting that Ramsden, in their transactions, would care for Ives' interest. FF 21 (CP 53-54). For example, Ives participated in a chain-letter "Friends Network gifting program" that simply involved sending cash to a number of people with the expectation that they, and others they in turn contacted, would send cash to you ever-increasing numbers. Exs. 36-44.

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[1] See discussion at 23-24, *infra,* and Appendix 1.

Ramsden specialized in selling limited partnership investments. FF 11 (CP 53). He marketed multiple different limited partnerships at any one time (RP I, 70/6 – 71/16; 72/5 – 73/7), and would sell interests in the same limited partnership to as many as 20-30 individuals (CP 410, p. 111, lines 9/15), sometimes marketing them in group seminar-type settings of 30-50 people (RP II, 81/16 – 82/25. He actively solicited Ives, and others, as clients. FF 17 (CP 53).

Ramsden also participated in Amway-type multi-level marketing programs, including a prepaid legal services program for which he Ives up as an "associate" (Ex. 35, Doc. 00093-95; RP II, 27/24 – 29/3), and a program selling vitamins or health related products (Ramsden didn't recall at trial if he had signed Ives up as a salesperson for the heath product program). RP II, 32/13 - 33/19; Ex. 34.

Under securities industry rules and regulations, as well as Washington law, a securities salesperson has an affirmative duty to determine a customer's financial circumstances and recommend only investments that he (objectively) *has* reasonable grounds to believe are "suitable" for that client in light of their circumstances. FF 7 (CP 52); Ex. 87; RP I, 157/18 – 159/21; 161/15 – 165/1. "Suitable" is a term of art, meaning appropriate in light of the client's circumstances, including his

- age,

- wealth (or lack of wealth),
- investment needs and objectives,
- risk tolerance, and
- investment sophistication[2].

This is the Suitability Rule, which originated in NASD Conduct Rule 2310 (Appendix 2) and is now also codified at RCW 21.20.702:

> **Suitability of recommendation—Reasonable grounds required**
>
> (1) In recommending to a customer the purchase . . . of a security, a . . . salesperson, [or] investment adviser. . . Must *have* reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to his or her other security holdings and as to his or her financial situation and needs.
>
> (2) Before the execution of a transaction recommended to a noninstitutional customer . . . , a broker-dealer, salesperson, [or] investment adviser . . . shall make reasonable efforts to obtain information concerning:
>
> (a) The customer's financial status;
> (b) The customer's tax status;
> (c) The customer's investment objectives; and
> (d) Such other information used or considered to be reasonable . . . in making recommendations to the customer.

All securities salespersons are required to be registered with the National Association of Securities Dealers (NASD) and comply with its rules. Ramsden was registered with the NASD. FF 3; CP 52. At his

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[2] Ramsden's trial testimony confused the industry's Suitability Rule with the unrelated requirements imposed by the promoters of limited partnerships in order for an investor to qualify, for the *partnership's* purposes, to invest in the limited partnership. S*ee* RP I, 159/22 – 160/21.

deposition Ramsden expressed near total ignorance of the Suitability Rule. CP 410, p. 13, line 10 – p. 15, line 4.

Ramsden knew Ives' financial circumstances, including his modest assets (unchallenged[3] FF 24, 25, CP 54-55; RP II, 21/8 – 27/21), that Ives was invested entirely in liquid, conservative, bond mutual funds (unchallenged FF 28; CP 55), and that his investment objective was to generate regular income with conservative investments. Unchallenged FF 26, 27, 28 (CP 55); Ex. 102; RP I, 172/20 – 173/10.

Yet between 1989 – 1993 Ramsden recommended and sold to Ives five speculative, illiquid, limited partnership interests that paid out extremely high commissions to the salesperson:

03/20/1989	$10,000	Phoenix Leasing Fund III
03/31/1989	$10,000	Southwest Oil & Gas Fund VIII
07/20/1990	$10,000	Windsor Park Properties 6
04/15/1991	$ 5,000	Southwest Oil & Gas Fund XB
12/29/1993	$12,150	Texas Keystone Natural Gas Drilling LP.

In each case Ives withdrew cash from his conservative bond mutual fund to invest in the limited partnership interests. Unchallenged FF 29; CP 55.

Ramsden collected about 8% commission on each of his limited partnership sales to Ives, which was "considerably higher than the

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[3] When this brief refers to a Finding as "unchallenged" it means Ramsden does not *dispute the finding is supported by substantial evidence*. See discussion at, p. 23, *infra*.

commission rate which brokers generally receive for the sale of stocks, bonds and mutual funds". Unchallenged FF 13 (CP 53.).

Despite Ives' investment objective of "income—conservative", every one of the limited partnership interests was high risk, in the "speculative" category. Unchallenged FF 39; CP 57; RP I, 84/22 – 85/12; RP II, 9/11 – 13/8; *see* disclaimers in Ex 29, p. H-6, Exs. 20, 21. Expert Scott Rhodes testified that "The term speculative in the investment industry is really a term of art that denotes a high level of risk—not just risk, but a high level of risk." RP I, 177/14-25.

The limited partnership interests were also all, by their nature, illiquid (RP I, 74/8 -78/5; CP 410, at p. 110, line 20 – p. 111, line. 8; p. 117, lines 21-24). Ramsden testified "They are not intended to be liquid, they all recite in their contracts that they are not liquid".[4] Instead, they aim to pay out income over long periods of time, and then, eventually to liquidate. S*ee, e.g.,* CP 410, p. 112, line 12 – 113, line 5. They are not sold on any national securities exchange (Unchallenged FF 31; CP 55-56; Ex.

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4 "The oil and gas limited partnerships by their very nature, . . . have extremely long lives. The area that Texas Keystone was drilling in Pennsylvania had a history of the average well lasting 40 to 50 years. The nature of the units themselves were absolutely illiquid and there's a disclaimer in the document to the purchaser that if they buy it they should understand that it could only be liquidated in the prior sale, basically. Substantial loss [sic]." RP I, 74/11 -22:

80 ¶¶ 5, 6, 7, 9), and Ives would have been unable to access those funds if he needed cash on short notice (RP 175/8 – 176/1). To sell a limited partnership interest an investor must find a private secondary market (RP I, 75/16 – 78/5), or hope the Partnership will buy it back (see RP II, 53/5 – 61/7). Ives' personal representative liquidated his limited partnership interests by selling them back to the Partnerships. RP II, 110/16 – 112/8.

Scott Rhodes, a financial planner and Chartered Financial Analyst, testified as an expert for the estate. Rhodes had for 10 years been an NASD examiner and investigator (Ex. 86), regularly auditing brokers and brokerage firm, examining whether their recommendations complied with the Suitability Rule (RP I, 154/17 -159/21).

Rhodes testified that in light of Ives' advanced age, modest income, limited assets, conservative investment objectives, and limited investment experience, Ramsden's recommendations that he purchase the pattern of limited partnerships was unsuitable (RP I, 165/2 – 174/13); illiquid investments were not appropriate for him (RP I, 175/8-21), and indeed, for someone in Ives' circumstances to put even $10,000 of a $100,000 net worth into a single illiquid investment "a very questionable practice" (RP I, 201/1-4); and the limited partnership interests had relatively high risk that was probably inconsistent with his objectives for conservative income-producing investments. RP I, 176/2 - 177/13.

Ives lost money on the limited partnership interests. Even after counting the income they paid out over the 6-10 years he owned them, he (and his Estate) did not even recover his principal, losing over $6,000:

	Phoenix Leasing	**SW Gas VIII A**	**Windsor Park**	**SW Gas X-B**	**Texas Keystone**	**Totals**
Purchase Date	3/29/89	3/29/89	7/20/90	4/15/91	12/29/93	
Purchase Price	$10,000	$10,000	$10,000	$5,000	$12,150	**$47,150**
Sell Date	12/17/99	01/05/99	02/19/99	1/05/99	12/07/99	
Total Return: income + sale	$ 9,039	$10,453	$11,802	$ 4,549	$ 5,074	**$40,917**

CP 393; RP II, 109/13 – 115/18; exhibits 81-85, 116.

No overall economic circumstances explain these losses. Rhodes testified that if Ives had just left his funds invested in an intermediate term bond fund, much like the IDS Funds he was invested in when Ramsden got involved—which was suitable for one in his circumstances—far from *losing* money he would have been $50,000 better off than with the limited partnerships. RP I, 178/12 – 180/17; Ex. 91.[5]

The Texas Keystone sale had an added twist: each unit cost $25,000 but Ives was down to his last $12,500 available cash, so Ramsden

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[5] Rhodes also testified that it would have been within the range of "suitable" for one in Ives' circumstances to take on modest risk and invest in a portfolio of 70% intermediate term bonds and 30% diversified stocks. Using the S&P 500 as a proxy for a diversified portfolio of stocks, Rhodes testified that with such a 70/30 investment mix during this same time period Ives would have been $59,000 better off than with the limited partnerships. RP 178/12 – 181/17; Ex. 92.

got permission from the promoter to sell Ives a ½ unit. FF 48, 49, 50; CP 58. Ramsden then filled out Texas Keystone's investor questionnaire for Ives, intentionally misstating facts about Ives' financial condition in order to meet Texas Keystone's minimum requirements for one to invest in the offering. FF 41, 42, 43, 44, 45, 46, and 47; CP 57-58.

Ramsden's personal borrowing from Ives

1990 Loan. After the first two limited partnership sales, Ramsden in 1990 borrowed $40,000 from Ives and $32,000 from another individual to buy a house. FF 57; CP 59. Ives withdrew cash from his bond mutual funds to loan the money to Ramsden. FF 58; CP 60. The loan was for one year, secured by a deed of trust on Ramsden's house. FF 59; CP 60.

May 1991 Loan. Ramsden made no payments on the loan, and when it came due in 1991 he borrowed another $32,000 from Ives to pay off the second lender, added $2,000 for accrued interest on the 1990 loan (FF 60, 61; CP 60), and signed a new 4-year promissory note for $72,000, again secured by a deed of trust (FF 60, 65, 66, 67, 68; CP 60-61).

With respect to the $2,000 accrued interest Ramsden "paid" the trial court, in findings which Ramsden does not deny are supported by substantial evidence (but which he argues were "unnecessary"), found:

> 61. The $2,000 interest Mr. Ramsden paid Mr. Ives for the $40,000 May 1990 loan amounted to 5% interest annually.

> 62. At the time of the May 1990 loan the current market rate of interest for mortgage loans was substantially higher than 5%.
>
> 63. . . . Mr. Ramsden was enriched by (1) avoiding the payment of the "points" and fees which were standard on mortgage loans, and (2) receiving an interest rate substantially below the then-current fair market rate of interest. . . .

Ives, on the other hand, got no greater return than he would have received from his bond mutual fund, while losing immediate access to the cash and incurring greater risk. FF 64; CP 60-61. The court awarded Ives $1,200 damages for the below market 5% of interest Ramsden paid. FF 15, CP 53; CL 36, CP 74.

July 1995 Loan ($86,900). When the 1991 note came due, instead of paying it off Ramsden executed a *new* note (FF 70; CP 61), rolling over the original $72,000 and adding accrued unpaid interest of $14,890. FF 71; 61. Ives was 83 years old at the time. The 1995 note was not due and payable for 10 years.

Ramsden prepared the 1995 promissory note (FF 72; CP 62), typing it up "off a computer program" (RP I, 93/7-22), along with an amortization schedule (RP I, 94/8 – 23; Ex. 15). Like the other notes, it recited that it was secured by a deed of trust on his house. The trial court found "It is likely that Mr. Ives relied on Mr. Ramsden, who had prepared the documentation, to record the Deed of Trust." FF 75; CP 62. No deed of trust was ever recorded. (Answer, CP 717).

The 1995 note called for 8% interest (FF 73; CP 62), while the court found in unchallenged Finding 77 (CP 62) that

> An unsecured personal loan by a commercial lender to a borrower with Mr. Ramsden's profile in July 1995 would have carried an interest rate of not less than 12% and more likely around 14%.

The court also found that Ramsden presented the 1991 and 1995 loans to him as investment opportunities for Ives. Unchallenged FF 81, CP 63.

To recap the sequence of events:

03/1989	Ramsden sells 83-year old Ives $10,000 SW Oil & Gas Fund VIII-A, $10,000 Phoenix Leasing.
05/1990	Ramsden borrows $40,000 secured by deed of trust.
07/1990	Ramsden sells Ives $10,000 Windsor Park.
02/1991	Ramsden borrows $30,000 more from Ives; new promissory note for $72,000 ($40,000 + $30,000 + $2,000 accrued interest) secured by deed of trust.
04/1991	Ramsden sells Ives $5,000 SW Oil & Gas XB.
12/1993	Ramsden sells Ives $12,150 Texas Keystone L.P.
07/1995	Ramsden rolls $72,000 loan plus accrued interest into new $86,500 10-year promissory note ; unsecured.

Ives' death; Consent Order

Ives died in 1996. His son, Jerome Ives, was appointed personal representative. Jerome complained about Ramsden's investments and personal borrowing to the Washington Department of Financial Institutions, Securities Division. After what Ramsden described as a very thorough investigation (RP I, 118/6-12) the Securities Division entered a Consent Order, accepted by Ramsden without admitting or denying its findings and conclusions, which found that in his sales of limited partnership interests to Ives and his borrowing from Ives, Ramsden:

1. Did not have reasonable grounds for believing that recommendations for the purchase . . . of a security were suitable;

2. Engaged in one or more dishonest or unethical practices by failing to have reasonable grounds for believing that his recommendations to purchase a security were suitable; and

3. Engaged in one or more dishonest or unethical practices by engaging in the practice of borrowing money from a customer.

FF 103; CP 66; Ex. 80.

Trial; Findings and Conclusions

Securities claims. The trial court found that all five of the limited partnership interests Ramsden recommended to Ives

- were speculative (FF 39; CP 57),
- were illiquid (FF 31; CP 55-56),
- had extremely high commissions (FF 13; CP 53), and
- constituted excessive trading due to their commission costs, in light of Mr. Ives's investment objectives and financial and other circumstances (FF 36, 37; CP 56).

But then the court concluded that only the final purchase—Texas Keystone— breached Ramsden's fiduciary duties to Ives and violated the suitability rule, simply because after each of the first 4 sales "Mr. Ives had sufficient liquidity for his circumstances." CL 3; CP 69.

The court also concluded that Ramsden made misrepresentations in connection with the sale of the Texas Keystone limited partnership interest

(CL 4; CP 69), violating RCW 21.20.010, and that his conduct violated the Consumer Protection Act.

Ramsden's personal loans from Mr. Ives. The court found that the July 1995 loan was an unsuitable investment for a person of Ives' age, financial circumstances, and with his investment objectives (FF 83, 84; CP 63). The court further found the personal loans created a conflict of interest between the fiduciary/professional and his client, and had the potential for repetition (FF 85; CP 63). The court concluded that by offering the opportunity to loan him money to Ives, Ramsden

- recommended an unsuitable investment (CL 13; CP 70-71);
- breached his fiduciary duties to Mr. Ives;
- breached his professional duty of due care and fair dealing;
- breached his ethical duties under securities industry statutes, rules, regulations, and standards of practice; and
- violated RCW Chapter 21.20 (CL 12, CP 70).

The court concluded Ramsden was unjustly enriched, and Ives was damaged by, the 1990 and 1995 loans but not by the 1991 secured note which bore a reasonable 12% rate of interest.

Finally, the court concluded that Ramsden's failure to provide the deed of trust called for in the 1995 note was a breach of the note.

V. ARGUMENT

A. The Trial Court Correctly Denied Ramsden's Motion to Dismiss Based on an Arbitration Clause.

When Ives opened his account with Ramsden's company he signed an arbitration clause.[6] It is not a "forum selection clause", as Ramsden mislabels it. Forum selection clauses address jurisdiction and venue in civil litigation. S*ee Voicelink Data Services, Inc. v. Datapulse, Inc,*. 86 Wn.App. 613, 937 P.2d 1158 (1997). "Jurisdiction" and "venue" have no role in arbitrations. None of the cases Ramsden cites (Brief, at p. 42) involved an arbitration clause.

The Estate sued Ramsden in Superior Court. The procedure to enforce an arbitration clause when the other party sues in court is a motion to stay the proceeding and refer the matter to arbitration. RCW 7.04.030[7]:

> If any action . . . be brought by any party to a written agreement to arbitrate, the court . . . shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in accordance with the agreement.

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[6] "The undersigned agree(s) that any and all controversies which may arise between me/us and United Pacific Securities, Inc. any of its officers, employees or agents . . . shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers." Exhibit 27.

The Predispute Arbitration Agreement disclosed (among other things) that one of its effects was that "The parties are waiving their right to seek remedies in court."

[7] Amended eff. January 1, 2006, with adoption of the Uniform Arbitration Act.

Ramsden did not raise the arbitration clause in his Answer (CP 714-716). He made no effort to stay the case or refer it to arbitration. Instead he litigated matter for more than three years (FF 114, 115, 118; CP 68), extensive discovery was conducted (FF 117; CP 68), two trial dates came and went (FF 116, CP 68)[8], and finally the parties appeared for trial. FF No. 118; CP 68.[9] Not until the first day of trial did Ramsden raise the arbitration clause, moving to dismiss.

The trial court correctly held that Ramsden had "waived his right to rely on, and compel arbitration pursuant to, the arbitration clauses." CL 35; CP 74. When a party engages in sustained litigation despite an arbitration clause, he waives the right to rely on that clause. S*teele v. Lundgren*, 85 Wn.App. 845, 935 P.2d 671 (1997); *Pederson v. Klinkert,* 56 Wn.2d 313, 352 P.2d 1025 (1960); *Lake Washington School District v. Mobile Modules Northwest,* 28 Wn.App. 59, 621 P.2d 791 (1980).

Ramsden just ignores this case law. Instead he argues that the trial court lacked jurisdiction over the parties because, in the arbitration clause,

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[8] Trial was first set for January 7, 2002. The parties continued the date to July 15, 2002. When the second trial date arrived it was bumped by a criminal trial. The date was reset and trial finally commenced on February 18, 2003.

[9] While Ramsden assigns error to every one of the trial court's factual findings, he does not argue that Findings 114-118 are unsupported by substantial evidence and they are verities on appeal. W*allace v. Kuehner*, 111 Wn.App. 809, 817, 46 P.3d 823 (2002) ("Wallace does not expressly argue against this portion of Finding No. 6. It is, therefore, a verity on appeal.")

Ives "waived" his right to pursue his remedies in court. This is incorrect.

Parties cannot, by contract between themselves, deprive a court of it personal jurisdiction. *Washington Local Lodge No. 104 v. International Brotherhood of Boilermakers,* Wn.2d 536, 544, 183 P.2d 504 (1947) ("If a court has no jurisdiction of an action, the parties cannot by stipulation confer it upon the court. . . . Likewise, if the court has jurisdiction, the parties cannot by contract deprive the court of it"); *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 32 L. Ed. 2d 513, 92 S.Ct. 1907 (1972):

> The argument that [forum selection] clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. . . . No one seriously contends in this case that the forum selection clause "ousted" the District Court of jurisdiction over Zapata's action.

A party signing a forum selection clause consents to personal jurisdiction in a particular forum, waiving the right to object that that forum does *not* have personal jurisdiction over him. K*ysar v. Lambert,* 76 Wn.App. 470, 478, 887 P.2d 431 (1995):

> because the personal jurisdiction requirement [that is, one's right to require that a court *have* personal jurisdiction over him] is a waiveable right . . . a litigant may *give* "express or implied consent to the personal jurisdiction of the court." (Emphases added.)

Contrary to Ramsden's assertion, the converse is *not* true. No authority holds that party consenting to one court's personal jurisdiction thereby deprives any other court of the personal jurisdiction it has under the law.

B. The Trial Court Correctly Denied Ramsden's Motion to Dismiss on Statute of Limitations Grounds.

Ramsden assigns error to a plethora of the trial court's Findings and Conclusions that relate to statute of limitations issues. But the sole statute of limitations issue he argues is that the trial court erred in not measuring the 3-year statute of limitations for fraud and securities claims from the date the decedent's family members first learned that Ives, Sr. had purchased limited partnership interests from Ramsden[10].

Before turning to this argument, it should be noted that:

- No statute of limitations argument on CPA claims. The court found that the conduct which was fraudulent and violated securities laws—sale of the Texas Keystone LP interest—also violated Washington's Consumer Protection Act, with a 4-year statute of limitations. CL 7, CL 9 (69-70). Ramsden does not argue that the 4-year statute ran.

- No statute of limitations argument on loan claims. Neither does Ramsden argue that the 6-year statute of limitations ran on the Estate's claims based on his loans from Ives at below-market rates, and failing to provide a deed of trust for the 1995 loan.

Ramsden erroneously treats the claims below as son *Jerome Ives'* claims ("Jerome Ives met with his family . . . And discussed Jerry Ives'

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[10] "In June 1996, more than three years before he filed this action, Jerome Ives met with his family . . . and discussed Jerry [Sr.] Ives' investments. . . . Jerome Ives' daughter-in-law and son were aghast that Jerry Ives [Sr.] had invested in limited partnerships. . . . Jerome Ives' claim for fraud, if any, accrued at that meeting. . . .

By failing to take action within three years of the June 1996 meeting . . . Jerome Ives' securities claims are . . . time-barred." (Brief, at 47) investments"; "*Jerome Ives' claim* for fraud, if any, accrued at that meeting"; "*Jerome Ives' securities claims* are . . . time-barred".) These were not Jerome Ives' claims. They were the senior Mr. Ives' claims, which survived not to his children or grandchildren, but to the personal representative of his Estate —whoever that might turn out to be. RCW 4.20.046 (Survival of actions):

> All causes of action by a person . . . against another person . . . shall survive to the personal representatives of the former.

Jerome Ives could not have commenced any action against Ramsden following the family meeting Ramsden cites. When the court appointed Jerome personal representative for his father's Estate, only then did he have the authority *as personal representative* to pursue the Estate's actions which survived to the personal representative. RCW 11.48.010.:

> It shall be the duty of every personal representative to settle the estate. . .. The personal representative shall collect all debts due the deceased. . . . The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate. . . .

At the time the family met following his father's death, Jerome had no status as a representative for the probate Estate. He was not appointed personal representative until July 9, 1996. FF No. 95; CP 65. This action was commenced on July 6, 1999 (Complaint, CP 722), less than 3 years after the personal representative was appointed. FF No. 95 (CP 65).

Ramsden offers no explanation for his bald assumption that knowledge which an individual may acquire after a decedent's death, but before any personal representative is appointed for the estate, triggers the statutes of limitations for the estate's personal representative to assert claims which by survive to him. Neither does Ramsden offer any authority for such a proposition. There is none.

Ramsden's myriad complaints about the trial court's Findings and Conclusions on the burdens of proof that apply to statutes of limitations are immaterial: it makes no difference who had the burden of proof on the statute of limitations issue argued by Ramsden, because no one disputes that the personal representative filed this action within three years of his appointment, which is when the claims survived to him.[11]

C. The Challenged Findings are Supported by Substantial Evidence, and Do Support the Trial Court's Conclusions.

1. Ramsden ignores the correct test for challenging factual findings, but instead just argues with the trial court.

On appeal the court reviews solely whether a trial court's findings

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[11] Still, it is an affirmative defense and the burden is on the party asserting the defense to prove that a statute of limitations bars a claim. R*ivas v. Eastside Radiology Associates*, 134 Wn.App. 921, 143 P.3d 330, 332 (2006). Only after a defendant establishes that a statute of limitations has run, is the burden is on the plaintiff to show the statute was tolled. Here, Ramsden never proved the statute ran on the personal representative's survivorship action in the first place.

of fact are supported by substantial evidence. And "where there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding". I*n re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). The party challenging a finding bears the burden of showing it is not supported by substantial evidence. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939-940, 845 P.2d 1331 (1993).

While assigning error to every single one of the trial court's 118 Findings of Fact, Ramsden does not dispute that most of them are supported by substantial evidence. Rather, he argues that (1) the trial court lacked jurisdiction to enter the Findings (discussed above), and/or (2) they were "unnecessary" to the trial court's result. Neither a purported lack of jurisdiction, nor "unnecessariness", undermines the substance of the evidence at trial supporting the trial court's findings. Appendix 1 lists the many Findings that Ramsden does not deny are supported by substantial evidence, and they are verities on appeal.

With the remaining Findings, Ramsden never tries to demonstrate the absence of substantial evidence. He instead just cites bits and pieces of evidence or inferences therefrom which he argues are "contrary to" various Findings, expecting this court to re-weigh the evidence.

Ramsden challenges many of the trial court's findings and conclusions on the sole ground that the trial court treated a $20,000 annuity, and Ives' personal loans to family members and Ramsden, as illiquid. Ramsden apparently assumes that an investment cannot violate the Suitability Rule unless, after the purchase, the investor is left with absolutely no liquid assets. Ramsden completely fails to understand, or to address, the elements of the Suitability Rule, which he never once mentions in his Brief on Appeal.

2. Ramsden's specific criticisms of the trial court's Findings and Conclusions.

Findings 33 and 37 (annuity commissions)**.** Besides the limited partnerships, Ramsden sold Ives a $20,000 American Skandia variable annuity. The Estate asserted no claim relating to that annuity. The trial court nevertheless entered findings that "Annuities have high commission rates for the salesman" (FF 33; CP 56), and Ives' "purchases of the limited partnership investments *and* the Skandia annuity constituted excessive trading due to their commission costs". FF 37 (CP 56).

Ramsden argues that annuities don't have high commissions. This is immaterial. The court below based no conclusions of law on the finding regarding the American Skandia commission. The Estate did not claim, and the court did not award, any damages related to the annuity.

Even so, the finding that "annuities" have high commission rates is supported by substantial evidence. When asked his commission on the American Skandia sale Ramsden initially testified "I don't know what the life insurance company paid. It was probably ***5%*** or less" (RP II, 40/10-20)—a "high" commission by any standard. It is true he modified that to say the commission on sales to persons over 70 generally "was reduced", but he *didn't know* what the commission was on the Ives annuity.[12] *Ibid.*

Finding 33 further stated annuities are "also illiquid, with penalties for early withdrawal", and the Skandia Annuity had "an annuity date of 1999". Ramsden argues that Ives could immediately begin receiving "some" annuity payments, but there was no evidence at trial to that effect. He admitted he himself did not know what withdrawals Ives could take from the annuity (RP II, 38/13-18).[13]

Ramsden doesn't seem to understand what liquid asset means: it is something that can quickly and without material cost be converted to cash. Annuities are an insurance product (RP II, 37/20-22; 38/22 – 39/9), designed to provide a stream of income over time (see fn.14, below).

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[12] The other "evidence" cited by Ramsden for his argument, Ex. 103, has no information about the commission on the Skandia annuity.

[13] Ramsden is incorrect when he asserts that plaintiff's counsel in argument "acknowledged" that Ives "had access to some of the $20,000.00 that he paid for the American Skandia annuity". Counsel said "*perhaps* Mr. Ives *may* have had access to some of that $20,000," when arguing it was immaterial.

Ramsden does not dispute the court's finding that the American Skandia contract set the Annuity Date for January 1, 1999—seven years in the future. Ex. 103, p. 3. An Annuity Date is the date the annuitant may begin drawing periodic annuity payments.[14] Further, Ramsden wrote, under "Remarks" on Ives' annuity application: "Do not need funds—Just want it to grow over the period" (*ibid.*)—clearly reflecting that no payments were expected to be made in the near future. Substantial evidence supports the court's Finding 33 that the American Skandia annuity was illiquid.

Findings 51, 68, 69 and 94. Each of these findings refers to Ramsden's sales of limited partnerships to Ives, or loans from Ives, as leaving Ives with little access to liquid funds. Ramsden argues the trial court "overlooked" evidence of other assets—Ives' American Skandia annuity (discussed above), personal loans to family members, and his loan

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[14] This term is explained on many major insurance companies' web sites. E.g.,

- Prudential Financial: "Annuity Date. The date when income payments begin, as specified in the annuity contract." http://www.prudential.com/glossary/;

- Wells Fargo Bank: "An annuity is a contract between you and an insurance company, under which you make purchase payments to the insurance company during the 'accumulation period' and the insurance company agrees to make periodic income payments to you, either beginning immediately or at some future date, during the "income period". . . . You may select the date on which income payments are to begin (the "annuity date"). https://www.wellsfargo.com/investing/annuities/intro

- Metropolitan Life: "Annuity Date: The date when your annuity income payments begin. This date usually appears in your annuity contract. You to Ramsden—assuming without discussion that personal loans to individuals are liquid assets.[15] Substantial evidence supports these findings:

- Ives had only about $105,000 in liquid assets when he met Ramsden. FF 25, 28 (CP 55);
- each time Ives withdrew funds from his liquid IDS account to buy limited partnerships or to loan money to Ramsden, his liquid assets shrunk;
- Ramsden's $86,500 note was not due and payable for 10 years (Ex. 14) and was unsecured (FF 74; CP 62). Clearly Ives could not have quickly and without cost converted it to cash;
- On Ives' death loans to his family members remained unpaid. They were still unpaid several years later, at the time of trial. RP III, 130/5 – 134/6.

Plaintiff's expert analyzed Ives' assets, and considered the personal loans to be illiquid:

> Q. What did you mean by liquidity?
>
> A. Um, Mr. Ives in 1989 only had a $100,000 worth of liquid net worth. He had—he may have had $175,000 to $200,000

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may be able to change this date, with limitations, before you reach the annuity or maturity date." http://www.metlife.com/Applications

[15] Ramsden also argues the court "overlooked" that Ives suffered no direct damages from the illiquidity of his investments. Ramsden's point is irrelevant. Damages were awarded because the Texas Keystone limited partnership was *unsuitable* for Ives—not because it was illiquid. Ives suffered damages due to his purchase of the unsuitable investment.

Liquidity is just a factor in evaluating whether an investment is suitable. The Texas Keystone investment was unsuitable because it was speculative, it was illiquid, and it had excessive commissions. It is irrelevant to the *suitability* determination which factor ultimately causes the resulting damage.

> worth of assets *but most of that was in promissory notes to his relatives*, so he was left with around a hundred [thousand liquid net worth]. RP I, 175/14-21.

Findings 42, 43, and 44. The trial court found that in connection with the sale of the Texas Keystone limited partnership, Ramsden filled out a Client Data Form dated December 29, 1993 (Exhibit 27) for Ives's signature. That form gave false information about Ives' income and net worth that just met the Texas Keystone Partnership's minimum requirements to qualify as an investor. FF 42, 43, and 44 (CP 57).

Ramsden doesn't deny that substantial evidence supports each of these findings. He argues the trial court "failed to recognize"—i.e., wasn't persuaded by—another bit of evidence: that Ives himself "provided detailed information in the Texas Keystone subscription agreement [an entirely different document], and had the subscription agreement notarized. EX. 29". (Brief, at 51- 52). The only "detailed information" in the subscription agreement was that Ives' net worth was at least 5 times his $12,150 investment (true), and his 1992 and 1993 taxable income would exceed $60,000 (not true). Nothing suggests the trial court "failed to recognize" the subscription agreement. The court just did not give it the weight Ramsden wants to give it. Regardless of what Ives signed in the subscription agreement, the court found that *Ramsden*, who had a fiduciary relationship with Ives and on whom Ives relied, knew the information he himself filled out for Ives on the Client Data Form was false. Substantial evidence supports that finding. S*ee* discussion below at 30-31, and FF 23 (CP 54); Ex. 102 (Ramsden's writing—see RP II, 8/12-22); FF 24 (CP 54); FF 25 (CP 55).

Finding 45. The court found "Mr. Ramsden knew that the dollar figures on the December 29, 1993 customer account form were not true." FF 45 (CP 58). Again Ramsden does not deny this. He instead argues that Ramsden was entitled to absolutely rely on the information Ives gave him (as if Ives would know the minimums required to buy into the Texas Keystone limited partnership). As discussed above, the court weighed the overall evidence and concluded that, despite what Ives signed off on in the subscription agreement, Ramsden was certainly not mislead by Ives as to his income or other circumstances.

Finding 46. The court found "Mr. Ramsden also knew that speculation was not one of Mr. Ives's investment goals." FF 46 (CP 58). Ramsden argues the court failed to give due weight to one piece of evidence: "that 'speculation' is circled under the heading of 'Investment Objectives' on the United Pacific Securities Client Data Form", citing exhibit 27. But exhibit 27 is the form Ramsden himself falsely filled out.

Substantial evidence supports Finding 46: when Ives first began doing business with Ramsden in 1989, his "Client Account Data" form stated his investment objectives to be "Cash Flow – Conservative". Ex. 102.[16] By December 1993 Ramsden knew that Ives had limited means and no history of speculating. Findings 23, 24, 25, 26 and 27 (CP 54-55), all unchallenged; Exs. 62-74.

Finding 47. The court found that Ramsden intentionally misrepresented the dollar amounts, and Ives's investments goals, on the 1993 Client Data Form so that Ives would meet Texas Keystone's criteria to invest in the limited partnership and Ramsden would receive a commission. (CP 58) Ramsden's sole objection to this finding is that the court was not persuaded by ("failed to recognize") his own testimony that:

> I never had any intent to ever defraud in this case anybody, but only to do a decent job of what I did.

RP III at 39-40. Substantial evidence supports FF 47. Ramsden knew

- Ives' true financial condition (FF 25; CP 55);
- Ives' investment objectives were conservative (FF 26, 27; CP 55);
- that in order to qualify to buy a Texas Keystone partnership interest investors were required to have a minimum net worth and level of income (FF 41; CP 57);
- the information on exhibit 27 about Ives' income ($61,000), investment experience (30 years, many types of investments), and investment objectives (speculation) was not true; and

[16] The court reporter transcribed testimony about "Cash flow—conservative" as "cash no conservative". RP II, 9/1-9.

- Ramsden filled out exhibit 27. Finding 42 (CP 57); *cf.* Ex. 102, Ramsden's writing (RP II, 8/12-22) with writing on Ex. 27;

Ramsden's subjective feeling that he "never had any intent to defraud anybody" does not cause this evidence to become insubstantial.

Finding 53. The court found that Ramsden's recommendation and sale of the Texas Keystone limited partnership interest to Ives

a. constituted an unfair or deceptive act;

b. occurred in the course of trade or commerce;

c. occurred in the course of Mr. Ramsden's business;

d. were part of a pattern or generalized course of conduct; and

e. occurred after repeated prior similar acts.

Finding 53 (CP 59). Ramsden assigns error to this finding claiming (the logic escapes Respondent) that after buying the Texas Keystone investment in December 1993 Ives still "retained liquid assets"—the Skandia annuity, personal loans to family and Ramsden, and income from social security and his pensions. The annuity and personal loans were not liquid assets. Income is not a "liquid asset"; it is income. And even if Ives had liquid assets after buying the Texas Keystone interest (which he did not), Ramsden's conduct still occurred in the course of trade or commerce, occurred in the course of Ramsden's business, would have constituted an unfair or deceptive act or practice, etc.

Ramsden further argues that Ives "affirmatively misrepresented his financial information" on the Texas Keystone subscription agreement. As discussed above the only incorrect information on the subscription agreement was his taxable income. The trial court obviously believed, from the rest of the evidence at trial, that Ramsden knew that income information was not correct. See above re Findings 42, 43 and 44.

Citing no evidence and offering no argument Ramsden finally just baldly asserts, in challenge to Finding 53, that "Dave's conduct had little potential to deceive substantial portion of the public, and was therefore neither unfair nor deceptive." The trial court found otherwise. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.* 105 Wash.2d 778, 790-791, 719 P.2d 531 (1986) establishes what gives rise to a potential for repetition in consumer transactions:

> [I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest. [Citation] Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? . . .[N]ot one of these factors is dispositive, nor is it necessary that all be present.

Ramsden's conduct was in the course of his business. He marketed himself to the public at large. He actively solicited customers like Ives to buy limited partnership interests. He and Ives had unequal bargaining positions. Virtually *all* the factors indicative of a potential for repetition are present here.

Finding 54. Ramsden is simply wrong when he complains, challenging Finding 54 (CP 59), that the court calculated damages based on "what a fair rate of return would have been during the same time on the same $12,125 investment".[17] Finding 54 clearly and explicitly applies the statutory formula to calculate the $15,958 damage award: (1) the original purchase price, (2) plus interest at 8% from the date of purchase, (3) less amounts actually received from the investment. CP 393; RP II, 109/13 – 115/18; exhibits 81-85, 116.

Also contrary to Ramsden's understanding, the court did credit Ramsden for the income received from the investment. I*bid*

Findings 56 and 91. Finding 56 (CP 59) determined that

> Securities industry standards of due care and professional conduct, and the rules and regulations governing securities salespersons, make it unethical and a breach of duty for a securities salesperson to borrow money personally from an investor client.

Ramsden argues "To the extent that Findings 56 and 91 rest upon WAC 60 22B.090(1)", these findings are in error because Ramsden's notes were

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[17] Ramsden cites comments at 42-43 of the courts' Memorandum Opinion. The court there simply pointed out that the dollar figure produced by the statutory

executed before that WAC became effective (August 20, 1995). But the Findings do not purport to "rest" on WAC 60-22B-090, nor, indeed, do they anywhere even mention that WAC.

Further, Finding 56 is not a determination of a disputed fact in the first place. It is a statement of law, and of the controlling industry standards, which are matters of law. The court's statement of the law, and industry standard, is correct. The North American Securities Administrators Association publishes on its web site a Statement of Policy, more than 20 years old, declaring it an unethical or dishonest business practice for a securities salesperson to "Engag[e] in the practice of lending or borrowing money or securities from a customer".[18] The NASD's Conduct Rules have long required that

> A member, in the conduct of [the member's] business, shall observe high standards of commercial honor and just and equitable principles of trade.

The NASD has disciplined securities salespersons who have engaged in unfair borrowing practices with customers under this rule. In 2003 the SEC formally adopted a rule explicitly barring all loans between brokers and investors arising out of their professional relationship (permitting

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formula was within the range of the alternative "well-managed portfolio" measures of damage advocated by Ives.

[18] NASAA Statement of Policy, 05/23/1983, available at www.nasaa.orgindustry_regulatory__resources/borker__dealers/1050.cfm

them only when there is an unrelated family or business relationship in five narrowly defined circumstances). This was not a new ethical standard. It reiterated and emphasized what had always been the case. As the NASD explained in Notice to Members 03-62 (available on the NASD web site):

> Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct. NASD has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests. . . .
>
> The safeguards provided under [the new] Rule 2370 are in addition to the general powers that NASD has to bring a disciplinary action against a registered person who has entered into an unethical lending arrangement with a customer under NASD Rule 2110.

Washington law has long prohibited stockbrokers from engaging in "dishonest or unethical practices in the securities or commodities business." RCW 21.20.110(g). The court had before it the Washington Securities Division's Consent Order (Ex. 80), which concluded that Ramsden *had* "engaged in one or more dishonest or unethical practices in the securities business" by borrowing money from Ives. The Securities Division, while referencing the recently promulgated WAC, held such practice was "grounds for suspension and/or revocation of Ramsden's securities salesperson registration *pursuant to RCW 21.20.110(g)*.

The trial court was also aware that just three weeks after Ramsden entered into the 1995 promissory note with Ives (on July 21, 1995), the Washington Securities Division had filed a regulation defining a stockbroker's "dishonest or unethical practices" to include "lending or borrowing money or securities from a customer", which became effective 30 days later as WAC 460-22B-090(1). The trial court could well have concluded that the Securities Division's filing reflected the existing industry standard in the weeks immediately prior to the formal filing.

Finding 56 (CP 59) correctly states the industry standard of requiring from a securities salesperson "high standards of commercial honor and just and equitable principles of trade," and to refrain from engaging in dishonest or unethical practices, including borrowing from a customer under the circumstances before the court.

Particularly since Ramsden was in a fiduciary relationship with Ives (FF 22; CP 54), Ives was justified in expecting that Ramsden would care for his interests in their transactions (FF 21; CP 54), and the loans created a conflict of interest, the court correctly ruled that as a matter of law, securities industries standards made it unethical and a breach of fiduciary duty for Ramsden to borrow money personally from Ives.

In any event, the only Conclusion of Law which relies on Finding 56 is CL 12(c) (CP 70), concluding that in taking the loans from Ives

Ramsden breached "breached his ethical duties under securities industry statutes, rules, regulations, and standards of practice"). All of the other parts of CL 12 are supported by Findings *independent* of FF 56, including unchallenged Findings 6, 8, 19, 21, 22, 63, 64, 77, and 81 (CP 52-63), and challenged findings (discussed herein) 69, 83, 84, 85 and 87 (CP 61-64).

Ramsden "challenges" **Findings 74** (failed to provide or record deed of trust securing 1995 promissory note); **75** (likely Ives relied on Ramsden to record deed of trust); **76** (no evidence whether or not Ives knew deed of trust not recorded); **79** (Ramsden borrowed $150,000 in 2000 and gave a deed of trust on his house, so not possible to specifically enforce 1995 note at trial); **82** (Ramsden offered Ives opportunity to make loans to him as a result of their business relationship, and in the course of his role as investment professional)[19] by arguing the 1995 promissory note did not obligate anyone to *provide* a deed of trust in the first place. He does not challenge the sufficiency of the evidence supporting any of the Findings, and they are verities on appeal. Instead, he argues with court's interpretation of the contract as calling for a deed of trust.

A court's goal in interpreting a contract is to ascertain the parties' intent. The facts that (1) the parties included in the note the provision that it *was* secured by a deed of trust, and (2) Ramsden's prior two loans from

Ives had been secured by recorded deeds of trust, are consistent with the court's interpretation of the contract. Ramsden just asserts the 1995 note did not call for any security. He offers no further explanation for his claim.

But in any event Finding 74 is supported by substantial evidence: Ramsden testified he did not prepare any deed of trust, and neither he nor his wife ever signed a deed of trust securing this note. RP I, 93/24 – 94/7.

Finding 75 is supported by substantial evidence:

- Ramsden prepared the promissory note (RP I, 93/7-22; Ex. 14);
- Ramsden prepared the amortization schedule (RP I, 94/8 – 23; Ex. 15);
- Ramsden prepared the escrow instructions for the earlier $40,000 original 1990 promissory note (Ex. 6);
- Ramsden prepared the escrow instructions directing the escrow company in 1991 to prepare/record reconveyances of the deeds of trust securing Ives and Vonderfecht 1990 notes (Ex. 10);
- Ramsden had filled out other documents for Ives (FF 23, 42; CP 54, CP 57);
- Ramsden had a law degree (FF 2; CP 51);
- Ramsden had a fiduciary relationship with Ives at the time he borrowed the money (FF 22; CP 54); and
- Ramsden's relationship with Ives justified Ives in expecting that Ramsden would care for Ives's interests (FF 21; CP 54).

Finding 76 ("no evidence whether. . .") is correct. Ramsden does

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[19] Findings 75-82 at CP 62-63.

not identify any such evidence.

Finding 79 is supported by substantial evidence: Ramsden's own testimony to the very facts which the court recited, at RP I, 95/3 – 99/11.

Finding 82 is supported by the entire history of the relationship between Ramsden and Ives:

- Ramsden established a professional relationship with Ives with Ives as the client;
- Ramsden sold Ives securities and insurance products over the course of many years;
- while the professional relationship was in effect, Ramsden borrowed the money from his client, Ives;
- Ramsden offered Ives the opportunity to loan him money as an *investment* (unchallenged Finding 81);
- recommending and selling investments was Ramsden's business.

Ramsden's objection to **Findings 83** (CP 54) (1995 loan was unsuitable investment for person of Ives' age, financial circumstances, and investment objectives) and **84** (CP 54) (Ramsden did not have reasonable grounds to believe 1995 loan was suitable investment), again, does not challenge the sufficiency of the evidence *supporting* them. Instead he points to what he thinks is "contrary" evidence, arguing (incorrectly) that the 1995 loan did not *exhaust* Ives' liquid assets, *ergo* it was not unsuitable. Ramsden is wrong factually: the annuity and personal loans that he thinks gave Ives post-1995 "liquid assets" were not liquid assets at all; see discussion *supra* 25-26. And he is wrong legally: an investment need not exhaust an investor's liquid assets in order to be unsuitable. That is just one factor—and a minor one—in the overall analysis; see discussion of the Suitability Rule, at 6-6, and 57-62.

Substantial evidence supports the court's findings Ramsden did not have no reasonable grounds to believe the 1995 loan was a suitable investment for one in Ives' financial and other circumstances:

- Ives was 82 years old; the 1995 loan put $86,900 of his limited assets out of his reach for *10 years*. He barely lived one more year. No substantial illiquid investment was suitable for one in his circumstances (RP I, 175/8-21; RP I, 201/1-4);

- Ives' total financial assets were very limited; the $86,500 investment concentrated 2/3 of those assets in a single investment, contrary to rules of prudent investment diversification;

- Ives' circumstances and his investment objectives called for conservative investments; an unsecured personal loan to a borrower individual of uncertain financial strength is high risk. That risk is starkly illustrated here: in 2000, with 6 years remaining on the note, Ramsden became totally disabled and ceased work. RP II, 68/4-10.

- the note bore below-market interest rates, exposing Ives to uncompensated risk, making it a poor investment.

Finding 85 (CP 83) (securities salesperson recommending that clients loan him money creates a conflict of interest). Simply ignoring the substance of this Finding—the circumstances create a conflict of interest—Ramsden argues that a securities salesperson was not *prohibited* by State law from borrowing from a client before the August 1995 promulgation of WAC 60 22B.090(1). That does not address the court's Finding. The court is here stating a logical proposition, not resolving a factual dispute: when a professional in a fiduciary position engages in a related-party transaction with a beneficiary in a subordinate position who is reliant on the professional, it logically and necessarily follows that the situation "creates a conflict of interest" and the "potential for deception".

Finding 87 (CP 64) (Ramsden's borrowing from client had the capacity to deceive a substantial portion of the public, i.e., investors relying on a securities salesperson's professional status) is supported by substantial evidence:

- Ramsden actively solicited Ives as a client, indicating potential solicitation of others (unchallenged FF 17, CP 53);
- Ramsden and Ives occupied unequal bargaining positions (unchallenged FF 19, CP 53);
- Ramsden was in the business of recommending and selling investments;
- Ramsden offered Ives the opportunity to loan him money as investments for Ives (unchallenged FF 81);
- Ramsden borrowed repeatedly from Ives, while he was a client (unchallenged FF 57-67, 70-73; CP 59-62);
- Ramsden actively solicited the public in general to purchase investments from him (unchallenged FF 17, CP 53);

- Ramsden had other clients (RP I, 63/2 – 64/9);
- Ramsden borrowed from other individuals during this same time frame (RP I, 85/13-21; RP II, 62/25 – 65/23);
- Ramsden apparently had money problems (See Exs. 128, 129; deposition at CP 410, p. 65 line 1 – p.67 line 25), and
- continued to need to borrow (deposition at CP 410, p. 86 line 24 – 87, line 20; RP I, 95/3 – 96/7; see RP 104/24-106/11).

The fact that as of the time of trial Ramsden had actually borrowed from only one client does not negate all of this evidence.

Finding 89 (CP 64) (Ramsden's 1995 loan from Ives was an unfair or deceptive act, occurred in the course of trade or commerce, etc) is supported by the entire history of this case, outlined in Respondent's Statement of Facts; unchallenged FF 73, 77 (note was at below market rate); the evidence cited above, re Finding 87 (CP 64).

Ramsden's objections to **Findings 78** (CP 62) (8% interest rate in 1995 promissory note not reasonable for unsecured note to a borrower with Ramsden's financial profile) and **Finding 90** (CP 64) (1995 loan caused Ives injury in his business or property, and damaged him by yielding a lower rate of return fair or reasonable) do not challenge the sufficiency of the evidence *supporting* them.

Instead he argues that what he thinks is "contrary" evidence should have lead to a different conclusion (the rate was "negotiated", and the note rate was the same as RCW 21.20 applies in calculating damages for violations of the statute). The evidence Ramsden cites demonstrates no "negotiation", and if it did, that would not disprove Findings 78 and 90: the court found that Ramsden had a fiduciary relationship with Ives, was in a superior bargaining position, and that Ives relied on Ramsden to look out for Ives' interests. "Negotiating" a below-market rate under the circumstances would not make it fair or reasonable.

Findings 78 and 90 are supported by the testimony of the Estate's expert witness on lending, Thomas Kirkwood (RP I, 133-148); Scott Rhodes' testimony calculating damages caused by the below-market rate of interest (RP I, 186 /20 – 189); and unchallenged FF 77 (CP 62):

> An unsecured personal loan by a commercial lender to a borrower with Mr. Ramsden's profile in July 1995 would have carried an interest rate of not less than 12% and more likely around 14%.

see unchallenged FF 63 (Ives not compensated for increased risk on earlier loan, either).

Conclusions 12, 16 and 26 (CP 70-72) (Ramsden's borrowing money from Ives, as a form of investment for Ives, violated WSSA). Ramsden argues "The notes were not securities", citing *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990).

Ramsden raises this argument for the first time on appeal. Following trial the court issued a written Memorandum Opinion (CP 328-

371) giving ample notice of its conclusions that the promissory notes violated the WSSA. When, after a long delay, proposed Findings and Conclusions were offered, Ramsden raised and argued a myriad of objections to them (CP 225-245, "Defendants' Objections to Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Judgment"; CP 173-203, "Defendants' Amended Objections to Plaintiff's Proposed Findings, etc."), and moved to amend his Answer to assert new defenses (CP 150-156, "Defendants' Motion to Amend Answer to Conform to Evidence").

In response to Ramsden's objections the court's Findings *were* significantly modified (*see* CP 129-148, "Plaintiff's Reply to Defendants' Amended Objection to Proposed Findings of Fact, etc."; CP 51-74, Findings and Conclusions). The court also allowed Ramsden to amend his Answer, raising new defenses (CP 44-47). But not once during all of this did Ramsden raise the issue of whether the notes constituted securities.

Still *Reves v. Ernst & Young* does not control. R*eves* was decided under the federal Securities Act and Securities Exchange Act. Washington courts hold that because the WSSA has a different purpose than the federal acts—solely the protection of investors, rather than also ensuring the integrity of the marketplace—the State act is to be more broadly construed than the federal acts to protect investors. In doing so, Washington courts apply a flexible standard to determine what constitutes a "security".

Kinney v. Cook, 130 Wn. App. 436, 441-442, 123 P.3d 508 (2005) (promissory note evidencing a personal loan between two individuals could qualify as a security under the WSSA):

> [S]ince the purpose of the federal statute is to protect investors and the integrity of the marketplace while the WSSA's purpose is limited to investor protection, the WSSA [will] be more broadly construed than the federal law [Citation]. . . .
>
> [I]n order for the transaction to involve a security, it must involve one of the statutory definitions. Under the current WSSA, a "security" is broadly defined to include:
>
>> [A]ny note; stock . . . ; evidence of indebtedness. . . . When we define "security" under the statutory scheme, our approach "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised . . . [Citations] "[F]orm should be disregarded for substance and the emphasis should be on economic reality." [Citation] This is consistent with what lawmakers had in mind when the securities laws were enacted, which was "to regulate investments, in whatever form they are made. . . ." [Citation]

Reves held that since the federal Securities Acts—*as does the WSSA*—define a "security" as "any note", the analysis begins with a rebuttable presumption that every note is a security. The party resisting its treatment as a security bears the burden of proving otherwise:

> [B]ecause the Securities Acts define "security" to include "any note," we begin with a presumption that every note is a security. . . .[T]his presumption cannot be irrebuttable. . . . Congress was concerned with regulating the investment market, not with creating a general federal cause of action for fraud. In an attempt to give more content to that dividing line, the Second Circuit has identified

> a list of instruments commonly denominated "notes" that nonetheless fall without the "security" category. . . .
>
> We conclude, then, that . . . [a] note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance . . . to one of the enumerated categories of instrument.

Ramsden's terse reference to *Reves* assumes without argument that his notes "bear a strong resemblance" one of the instruments in that "list". But while Washington applies *Reves'* rebuttable presumption that every note is a security, it adds a policy factor when considering whether in a particular case an instrument is a security. D*ouglass v. Stanger,* 101 Wn. App. 243, 2 P.3d 998 (2000):

> In *Reves*, the United States Supreme Court adopted the "family resemblance" test. [Citation] . . .
>
> In Washington, we also add a policy consideration to the *Reves*' test. The primary policy of the WSSA is "to protect investors." And so we construe the Act liberally. [Citation] Given this liberal construction and given the *Reves* rebuttable presumption that every note is a security, Mr. Douglass has raised an issue of fact as to whether the note and investment agreement here constitute a security under the WSSA.

The Findings of Fact support the court's conclusions that Ramsden's notes to Ives in this case qualified as securities: unchallenged FF 81, CP 63 (Ramsden offered Ives the opportunity make the 1991 and 1995 loans to him as investments for Ives); FF 82 (Ramsden did so in the course of his role as an investment professional); unchallenged FF 58, 59;

CP 60 (Ives sold existing securities to fund the 1990 loan, intending to make the same rate of interest as he had been making on the securities).

In light of the liberal construction to be given to the WSSA in order to protect investors, and Washington's rebuttable presumption that every note is a security, Ramsden has not met his burden of proving the trial court erred in treating his notes as securities.

Conclusions 17, 18, 19, 20 (CP 71). Ramsden, with uncertain purpose, argues briefly over some of the court's conclusions that go to the issue of remedies relating to the 1995 promissory note: CL 17 (Ramsden breached 1995 note by failing to provide deed of trust); CL 18 failure to provide security for 1995 note caused failure of consideration); CL 19 (1995 note is voidable due to failure of consideration); CL 20 (declaring 1995 note immediately due and payable).

Ramsden argues his promise to pay was sufficient consideration for the note. This is irrelevant. Although declaring the 1995 note to be voidable due to lack of consideration, the court did *not* void the note or (the usual remedy) order rescission[20]. Instead, the court further concluded

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[20] Still, the trial court was entirely within its discretion in concluding that there had been a failure of consideration. Failure of consideration comes in all shapes and sizes. A "substantial" failure of consideration will justify rescission if it goes "to the root of the contract or be such as to defeat the aims and intentions of the parties" (*Shook v. Scott*, 56 Wash.2d 351, 367, 353 P.2d 431, 440 (1960). But "Where the partial failure of consideration is slight in comparison with the whole consideration . . . , damages are easily ascertainable and the vendee can be

that the failure to provide the deed of trust was simple a breach of contract. As a remedy the court accelerated the note. This was an appropriate remedy, and within the court's discretion.

But the whole issue is moot: the 1995 promissory note matured after trial concluded, in July 2005. The note is now fully due and payable, regardless of what the court did, or whether the court is affirmed or reversed on appeal.

The court also ordered that an equitable lien would be imposed on Ramsden's house to secure the 1995 note. Again, this is moot. The entire judgment, by statute, automatically created a lien on any real property in the county. The personal representative prior to trial recorded a *lis pendens* on Ramsden's house. CP 692. So the Estate has a judgment lien on Ramsden's house relating back to the date of the *lis pendens*. The court's attempted remedy of imposing an equitable lien is of no effect. Ramsden's complaint about the equitable lien is moot.

Ramsden argues that by accepting Ramsden's payments on the note despite his failure to provide a deed of trust Ives somehow "waived by implication" the lien of the mortgage. Accepting monthly payments is in no way inconsistent with simultaneously seeking to enforce the lien.

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thereby fully compensated . . . , the purchaser will not be permitted to rescind, but will be allowed a proportionate abatement from the purchase price." *Capital Sav. & Loan Ass'n v. Convey*, 175 Wash. 224, 227-228, 27 P.2d 136, 138 (1933).

Waiver is the intentional relinquishment of a known right. Accepting payments on a note in no way "implies" that the lender waives any claim to enforce the borrower's obligation to provide security.

D. Plaintiff's Claims Are Neither Exempt from the CPA, Nor Barred by the Doctrine of Primary Jurisdiction.

Ramsden argues the CPA is preempted because securities sales are within a regulated industry. Prior to 1974 that may have been the case. Before 1974 RCW 19.86.170 exempted regulated industries, generally, from the CPA. But the Legislature in 1974 amended the law, narrowing the range of exempted industries. K*ittilson v. Ford*, 23 Wash.App. 402, 409, 595 P.2d 944 (1979), *aff'd and opinion adopted,* 93 Wn.2d 223, 608 P.2d 264 (1980). The statute now exempts from the CPA only

- transactions regulated by the insurance commissioner, the WUTC, and the federal power commission; and
- transactions otherwise *permitted* –not just regulated—by any other regulatory body or officer.

Since 1974 courts have permitted plaintiffs to pursue CPA claims arising from securities transactions. S*ee, e.g., Schmidt v. Cornerstone Investments, Inc,* 115 Wn.2d 148, 166-67 (1990) (affirming jury verdict under CPA in case involving investment that violated Washington Securities Act); *Reves v. Teuscher*, 881 F.2d 1495 (9^{th} Cir. 1989) (affirming jury verdict based on investment that violated WSSA and CPA); *Burgess v. Premier Corp.*, 727 F.2d 826 (9^{th} Cir. 1984) (same).

To be exempt from RCW 19.86.170 as "permitted", conduct must be affirmatively and specifically permitted. E*dmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 942 P.2d 1072 (1997). Ramsden argues that the Consent Order "specifically permitted" him to borrow money from Ives. But the Consent Order condemned the loan as illegal. After the fact it ordered him to continue timely making payments. This hardly qualifies as affirmatively and specifically giving him permission to take the loan.

E. The doctrine of "primary jurisdiction" does not apply here.

Ramsden fundamentally confuses the application of this doctrine at the state level with the very different concepts of *federal* preemption, and primary *federal* jurisdiction. V*ogt v. Seattle-First National Bank,* 117 Wn.2d 541 (1991) and *Miller v. U.S. Bank of Washington*, 72 Wn. App. 416 (1994), on which he relies, are not on point.

Vogt held that the federal government's pervasive regulation of the banking industry did not preempt the CPA, and despite sweeping federal regulation of the banking industry the Comptroller of the Currency did not have primary jurisdiction over plaintiff's deceptive practices claim. M*iller* likewise focused solely on the federal preemption of state laws, holding in that case that "pervasive federal regulation of the banking system" preempted state laws governing certain claims.

At the state level the doctrine of primary jurisdiction simply allows a state court, in its discretion, to refer a matter to a state agency which is better situated to resolve it. *Rabon v. City of Seattle*, 107 Wn. App. 734, 34 P.3d 821 (2001); *Northwest Ecosystem Alliance v. Washington Dept. of Ecology*, 104 Wash.App. 901, 17 P.3d 697 (2001), *aff'd in part, rev. in part,* 149 Wn.2d 67, 66 P.3d 614 (2003). *Northwest Ecosystem* summarizes the law:

> [T]he doctrine of primary jurisdiction . . . applies where a claim originally is within the jurisdiction of the courts, but the enforcement of that claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]" [Citation.] In such instances, "the judicial process is suspended pending referral of such issues to the administrative body for its views." [Citation.]

The State Securities Division is not charged with obtaining relief for individuals with claims against stockbrokers. It does not have the resources to do so, nor is it better situated than the courts to decide the sorts of misrepresentation and negligence issues that ordinarily are involved in such claims. Indeed, the Legislature has explicitly given individuals the right to pursue private causes of action for violations of the State Securities Act. RCW 21.20.460. Nothing suggests the State, by establishing the Securities

Division, pre-empted individuals from pursuing private rights of action arising out of the securities laws.

F. Ramsden's "Failure to Mitigate" Argument is Specious.

Ramsden argues the personal representative somehow failed to "mitigate" the Estate's damages, declaring bizarrely that "Nothing prevented Jerome lves, at any time after July I, 1999, from requiring Dave and Michele to sign a deed of trust." Only the Grantors could execute that document. The personal representative *sued* him for his failure to provide a deed of trust, and Ramsden still did not execute the deed of trust.

And Ramsden has his facts wrong: Jerome Ives testified that after his father's death he *did* contact Ramsden and request a deed of trust. RP III, 16/1-17. Finally, the elapse of time in obtaining the lien on Ramsden's house between mid-1999 and the date of the Estate's *lis pendens* did not add to the Estate's damages. "Requiring" Ramsden to provide the security in 1999 would have mitigated nothing.

A motion for leave to amend is within the trial court's discretion. Given the meritless theory Ramsden sought to argue, and the evidence contrary to his theory, the court did not abuse its discretion in denying the motion to amend to add the defense of failure to mitigate.

G. The Court Correctly Calculated Damages and Interest.

Ramsden seems to assume that subsection (3) of RCW 4.56.110 applies to everything. RCW 4.56.110 sets the interest rate for four categories of judgments: subsection (1) breach of contract (contract rate); (2) child support (12%); (3) tort claims (floating rate); and (4) all other claims (12%).

WSSA claim: 8%. The court in Judgment ¶ 1(a) and 2(b) calculated damages on Ives' WSSA claim by adding interest at the statutory rate of 8%, and continued that rate after the entry of judgment. Ramsden fails to demonstrate that this was incorrect. RCW 21.20.430 provides:

> Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

It would be contrary to the liberal construction of the WSSA for the protection of investors to construe the statue such that, upon reducing his securities claim to judgment, an unpaid investor suddenly becomes entitled to less than the statutory rate prescribed for measuring his loss.

Promissory notes: contract rate. The court also correctly reformed the 1995 note to bear interest at 12%. The court then awarded post judgment interest on the 1990 note at the note rate of 8%, and on the 1995 note at the reformed note rate of 12%. RCW 4.56.110(1) applies to contract claims, not subsection (3).

Costs and attorneys' fees. The court awarded 12% post judgment interest on the award of costs and attorneys' fees. RCW 4.56.110(4) provides for post judgment interest at 12% on "all other claims". The attorney's fees were awarded under the terms of Ramsden's 1995 note, as well at under the WSSA and CPA. Ramsden fails to argue or explain why the award of attorneys fees and costs should be deemed a "judgment founded on the tortious conduct of individuals" rather than on breach of contract, or nontortious statutory violations.

H. The Trial Court Correctly Awarded Attorney's Fees.

While Ramsden says he "assigns error" to the court's award of fees, in the three lines he devotes to this issue no argument is presented. The court's findings of fact with respect to attorney's fees are unchallenged, and are verities on appeal.

VI. CROSS APPEAL OF RESPONDENT

The court's Conclusion of Law No. 3 that

> The following limited partnership investments Mr. Ramsden recommended and sold to Mr. Ives were not unsuitable, because Mr. Ives had sufficient liquidity for his circumstances following each of the purchases: (listing the first four of Ramsden's sales)

is not supported by the court's findings of fact in two respects: (1) regardless of Ives' liquid assets remaining after each purchase, Ramsden's recommendations violated the Suitability Rule, and (2) the facts do not establish that Ives had sufficient liquidity for his circumstances.

A. All of Ramsden's recommendations that Ives invest in the limited partnerships violated the Suitability Rule.

The court entered findings applying to every one of Ramsden's recommendations that Ives invest in limited partnerships, that:

> 13. Mr. Ramsden generally received a commission of about 8% of the sale amount when he sold limited partnership interests. This is considerably higher than the commission rate which brokers generally receive for the sale of stocks, bonds and mutual funds.
>
> 14. In March 1989 G. Jerome Ives ("Mr. Ives") was 75 years old, retired, and lived in a mortgaged mobile home in Sequim, Washington.
>
> 18. Mr. Ives was not a totally naïve investor, but he did not have a great deal of sophistication about investments.
>
> 24. In March 1989 Mr. Ramsden knew that Mr. Ives was 75 years old, and had about $31,000 income per year annually from his investments, pensions and Social Security.
>
> 25. In March 1989 Mr. Ramsden also understood that Mr. Ives owned no real estate; few fixed assets, consisting of a mobile home with a fair market value of about $40,000 but subject to a mortgage of about $15,000, and two vehicles with a total value of about $10,000; and liquid assets of about $102,000 in mutual funds and $3,000 cash.
>
> 27. Mr. Ramsden knew . . . that Mr. Ives's investment objectives were to generate cash flow, with conservative investments.

> 28. Mr. Ives's liquid assets of about $102,000 had been invested, prior to dealing with Mr. Ramsden, in income-yielding bond funds and cash. . . .
>
> 30. The funds to purchase the limited partnership investments were withdrawn by Mr. Ives from his liquid mutual funds account.
>
> 31. All of the limited partnership investments were illiquid. Investors did not have the option to withdraw cash at will from their principal investment at will. They were not traded on any exchange and there was no public or organized trading market in them.
>
> 37. Mr. Ives's purchases of the limited partnership investments and the Skandia annuity constituted excessive trading due to their commission costs, in light of Mr. Ives's investment objectives and financial and other circumstances.
>
> 39. All of the limited partnership investments Mr. Ramsden sold to Mr. Ives were speculative.
>
> 46. Mr. Ramsden also knew that speculation was not one of Mr. Ives's investment goals.

The court erred by focusing on just one factor to conclude that Ramsden's first four recommendations of limited partnership investments were suitable: that, after investing in each of them, Ives still had adequate liquid assets for his circumstances. But it is not sufficient, standing along, that after buying a security the investor still has adequate liquid assets, to make a recommendation suitable.

Here, the court's findings of fact establish that every characteristic of every limited partnership investment was utterly inconsistent with Ives' circumstances.

The Estate's expert, former NASD examiner Scott Rhodes, testified that in light of Ives' age, income, assets, investment objectives, and limited investment experience, all of Ramsden's recommendations that Ives purchase the pattern of limited partnerships was unsuitable. RP I, 165/2 – 174/13.

B. Speculative investments were not suitable for one in Ives' circumstances.

Ives age, limited means, and investment objective of "income—conservative" called for low risk investments. Every one of the limited partnership investments was speculative.

In re Jack H. Stein, Complaint No. C 07000003 (NAC Dec. 3, 2001)[21], an NASD disciplinary proceeding that involved unsuitable recommendations, is closely on point and illustrates the application of the rule. In *Stein,* the NASD's National Adjudicatory Council[22] considered a lower NASD tribunal's discipline against a broker accused of making

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[21] NASD National Adjudicatory Council cases are available at http://www.nasd.com/RegulatoryEnforcement/Adjudication/NationalAdjudicatoryCouncil(NAC)/NACDisciplinaryDecisions/2004Decisions/index.

[22] Each NASD District has a District Business Conduct Committee (DCBB) empowered to issue formal complaints against brokers for violating NASD rules, conduct hearings, and impose sanctions. The broker can appeal to the NASD's "National Adjudicatory Council". The NAC issues formal opinions, which stand a precedent. Since few cases against stockbrokers have been brought in court since the mid 1980's, when the Supreme Court upheld the validity of arbitration clauses in brokerage account agreements, there has been little case law addressing

unsuitable recommendations to a customer (identified as "EA") whose circumstances were very much like Ives':

> EA was 57 years old, [when] she transferred her account . . . to Stein. . . . EA's account was worth approximately $78,000 and included conservative investments. . . . EA's new account form . . . listed her annual income as $25,000 (from her position as a social worker at a hospital), her approximate net worth as $100,000, and her investment objective as income.

Ives was even older than EA. Unlike her he was no longer working and was on a fixed income, limiting his ability to recover from investment losses. His investment account was worth $102,000 and his total net worth was $176,000. His investment account held solely conservative investments (bond mutual funds) when he met Ramsden. He had $21,000 income per year from social security and pensions. His investment objective when he met Ramsden was conservative investing.

Ramsden's investment recommendations to Ives closely resembled Stein's:

> In May 1994, Stein . . . began purchasing speculative securities related to oil, gas, copper, and gold mining in EA's account. . . . [T]he positions in her portfolio became more speculative. By the end of 1994, Stein had invested 43 percent of her portfolio in speculative securities. . . . By the end of 1995, Stein had invested 90 percent of EA's portfolio in speculative securities

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the suitability rule. NAC opinions, which are available on the NASD's web site, are among the best current source of legal analysis of a broker's responsibilities under the Suitability Rule.

The NAC explained why these recommendations were unsuitable:

> Stein's recommendations led EA to place significant portions of her asset value in speculative oil, gas, and mining securities, *which were inconsistent with the relatively safe investments that she had held* in the account prior to transferring her account to [Stein's firm] . . . .

Likewise, Ramsden led Ives to place significant portions of his asset value in speculative limited partnership interests, which were inconsistent with the relatively safe investments he had previously held. By the end of 1993 Ramsden had invested 47% of Ives' investment account ($47,500 of the original $102,000) in speculative securities, with 27% concentrated in oil and gas ventures. (And by mid-1995 *100%* of his financial assets were tied up in speculative securities and a risky unsecured loan to an unhealthy borrower with financial problems).

The NAC held that Stein's recommendations violated the Suitability Rule because (1) they were too risky for someone with her modest income and net worth, and (2) the concentration of her portfolio in a limited number of non-diverse investments increased her risk of loss:

> Based on the concrete information available to Stein regarding EA's financial status, we find that the investment strategy that Stein recommended for EA resulted in EA's investing in stocks that were *too risky for someone with her modest income and net worth* and that Stein *concentrated an excessive portion* of EA's portfolio in a non-diverse, limited number of speculative securities, thereby *increasing EA's risk of loss*. (Emphasis added.) See *Stephen Thorlief Rangen*, 52 S.E.C. 1304 (1997) (concentration of equity in particular securities increases risk of loss beyond what is

> consistent with the objective of safe, non-speculative investing); *Clinton Hugh Holland, Jr.* 52 S.E.C. 562 (1995) (concentration of high risk and speculative securities and shift of portfolio from conservative to speculative investments was not suitable), aff'd, 105 F.3d 665 (9th Cir. 1997) (table format).

The same analysis applies with equal force Ramsden's strategy of recommending that Ives invest in a limited number of speculative limited partnerships. The limited partnerships were too risky for on in his circumstances. See RP I, 176/2 - 177/13.

C. Illiquid investments were not suitable for a 75 year old investor of very limited means.

Ives had only $105,000 in liquid assets at age 75. This would not last long if he needed an assisted living facility. Neither would it leave much cushion if he experienced any large emergency expense. Because of his limited means and age, illiquid investments were not appropriate for him. RP I, 175/8-21. Scott Rhodes testified that for someone like Ives

> To put $10,000 of a person's $100,000 liquid net worth into *any* issue or any single investment that's a liquid [sic] is a very questionable practices. RP I, 201/1-4.

But with his very first recommendations, Ramsden tied up *$20,000* of Ives' limited funds in investments that were not expected to liquidate and pay out for decades. Ramsden testified at deposition

> Southwest Oil & Gas was a production-oriented oil and gas investment. . . . They drilled with the money that they raised X number of wells. And then as the oil is pumped out of the field, they spread the income amongst the investors. The income stream

> lasts the life of the well which can be anywhere between, depending on which program, six to fifty years or longer. And the investor is cautioned not to expect the return of their principal, but that this thing is a long-term income vehicle.

CO 410, at pp 112-113. After the March 1989 purchases of Southwest Oil & Gas Fund VIII-A and Phoenix Leasing L.P., Ives had only $85,000 available in liquid assets—for the rest of his probable life.

As the chart below shows, when Ramsden recommended that Ives invest in the Windsor Park Properties limited partnership the following year, Ramsden had already borrowed $40,000 of Ives' liquid assets. After tying up another $10,000 in Windsor Park, Ives was left with slightly over $40,000 in liquid assets. To last the rest of his life. The court erred in concluding, based on these facts, that $40,000 was "sufficient liquidity" for a 77 year old with limited income.

02/1989	Starting liquid assets	$105,000[23]
03/1989	$10,000 SW Oil & Gas Fund VIII-A $10,000 Phoenix Leasing	(20,000) $ 85,000
07/1989		$ 87,270[24]
05/1990	Ramsden borrows $40,000 from Ives	(40,000) $ 53,000[25]

[23] Exs. 71, 119; RP II, 95/19 – 96/1; 98/19 – 99/10). Ives had two IDS accounts, so care must be taken when looking at individual IDS statements.

[24] Exs. 67 and 72 (Doc. 00346). In August 1989 Ives withdrew $10,000 from his IDS account and purchased $10,000 MacKenzie Total Return mutual fund from Ramsden. Exs. 64 and 78. Those funds, while not now with IDS, were liquid.

[25] Ives' IDS accounts appear to have been making money, so the net remaining is reflects some increase in assets over time.

07/1990	$10,000 Windsor Park	(10,000) $ 43,000
02/1991	Ramsden borrows $30,000 more from Ives; new promissory note for $72,000 (original $40,000 + $30,000 + $2,000)	(30,000) $ 15,000[26]
04/1991	$5,000 SW Oil & Gas Fund XB	(5,000) $ 10,000

And after Ives had loaned Ramsden another $30,000, leaving Ives with only $15,000 in ready liquid assets, Ramsden recommended that Ives tie up $5,000 of that in yet another limited partnership investment. The court erred in concluding that the $10,000 Ives had left after the 1991 investment in Southwest Oil & Gas Fund XB was sufficient liquidity for one of his age, limited means and limited fixed income.

D. High commission securities were not suitable for one in Ives' circumstances.

Ives could ill-afford to spend his limited means on unnecessary brokerage commissions. The court found that the purchase of *all* the limited partnerships "constituted excessive trading due to their commission costs, in light of Mr. Ives's investment objectives and financial and other circumstances". FF 36, 37; CP 56. Ives had a world of alternative investments available to him that did not take 8% off the top. What about Ives' circumstances would give a securities salesperson

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[26] Includes assumed earnings on investments in the interim between purchases.

grounds to reasonably believe that high-commission investments were consistent with his needs and objectives?

E. The limited partnerships did not provide conservative income, nor did they provide regular income.

Ives his investment objective was to generate regular income with conservative investments. Unchallenged FF 26, 27, 28 (CP 55). The limited partnerships were designed to generate income, but it was neither regular, nor was it a conservative source of income like the IDS bond mutual funds he had previously owned.

A review of the history of the income payments for the five limited partnerships (Exs. 81-85) shows that the income varied greatly from period to period. And, after a few years, in most cases, in dwindled to very little or stopped altogether. Ives' circumstances called for secure, regular, income. The limited partnerships did not meet those criteria. Ramsden himself acknowledged "Dave would also advise the client that there was no fixed income stream associated with the investment, and that the client could lose all of his money. RP II at 12". Appeal Brief, at 21.

In light of what he knew about Mr. Ives age, experience, financial circumstances and investment objectives, David Ramsden did not have reasonable grounds to believe that any of the limited partnerships he recommended to Ives was suitable. The only reason they were recommended is because Ramsden pocketed a rich 8% commission every time he foisted one of them off on the trusting elderly Mr. Ives.

The court got the facts correct in its Findings of Fact. But those facts do not support the court's conclusion that the first four limited partnerships Ramsden sold to Mr. Ives were suitable for him.

VII. ATTORNEYS FEES AND COSTS

Respondent requests an award of attorney's fees and costs on appeal. Pursuant to RAP 18.1, the terms of the 1995 promissory note at issue, RCW 21.20.430, and RCW 19.86.090.

The trial court correctly held that the attorney's fees clause in the parties' 1995 promissory note was sufficiently broad to cover the present dispute.

Certain of Respondents' claims are grounded in violations of the Washington State Securities Act, RCW Ch. 21.20, for which an award of fees is provided.

The trial court also concluded that Appellant's conduct in certain instances violated RCW Ch. 19.86 which, again, warranted an award of fees for the costs associated with such claims.

DATED: December 15, 2006.

Carlson & Dennett, P.S.

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APPENDIX 1

Findings of Fact Not Challenged as Lacking Substantial Evidentiary Support

2. Mr. Ramsden also had a law degree at the time of the events at issue in this case, although he had not engaged in the practice of law.

4. As a licensed securities salesperson Mr. Ramsden was subject to the rules and regulations of the National Association of Securities Dealers, and to the provisions of RCW Chapter 21.20.

5. As any professional, a securities salesperson must employ such care, skill, prudence, diligence and judgment as might reasonably be expected of persons skilled in his calling.

6. Securities salespersons owe their client a duty, at common law and pursuant to the rules and regulations of the securities industry, of fair dealing.

7. A securities salesperson has a duty to (1) determine a customer's financial circumstances, and (2) recommend only investments and investment strategies that the salesperson has reasonable grounds to believe are suitable for that client, in light of the client's individual circumstances. "Suitable" means appropriate, in light of the client's age, wealth (or lack of wealth), investment needs and objectives, risk tolerance, and investment sophistication.

8. A securities salesperson has a duty to refrain from making recommendations that are incompatible with a client's financial and other circumstances, even if a client seeks to engage in speculative or otherwise unwise transactions.

9. A securities salesperson has a duty to make recommendations in the best interests of the client, and to counsel the client against unsuitable transactions or strategies.

10. A securities salesperson is deemed to have recommended an investment when the salesperson brings a specific investment opportunity to the attention of the client through any means, or makes a

suggestion or other statement that can reasonably be expected to influence a client's decision.

11. Mr. Ramsden specialized in marketing and selling limited partnership interests, when he was associated as a registered stockbroker with Titan Capital and United Pacific Securities.

12. Before selling limited partnership interests to clients Mr. Ramsden would inform himself about the investments, sometimes visiting the offices of the limited partnership promoters on trips that were on at least some occasions paid for by the limited partnership promoters.

13. Mr. Ramsden generally received a commission of about 8% of the sale amount when he sold limited partnership interests. This is considerably higher than the commission rate which brokers generally receive for the sale of stocks, bonds and mutual funds.

14 In March 1989 G. Jerome Ives ("Mr. Ives") was 75 years old, retired, and lived in a mortgaged mobile home in Sequim, Washington.

15 Mr. Ramsden moved from Los Angeles to Sequim around 1988, and became acquainted with Mr. Ives shortly thereafter.

16. Mr. Ramsden and Mr. Ives socialized together, and became friends. Mr. Ramsden visited Mr. Ives's mobile home on several occasions.

17. Mr. Ramsden actively solicited Mr. Ives as a client, and solicited other individual investors as clients, following his move to Sequim.

18. Mr. Ives was not a totally naïve investor, but he did not have a great deal of sophistication about investments. He did keep meticulous records of his financial accounts.

19. Mr. Ramsden occupied an unequal bargaining position with Mr. Ives at the time of the transactions at issue in this case.

20. When Mr. Ramsden recommended and sold the limited partnerships to the attention of Mr. Ives, Mr. Ives reasonably believed that

Mr. Ramsden was acting for Mr. Ives's benefit rather than out of Mr. Ramsden's self interest.

21. Mr. Ramsden occupied such a relation to Mr. Ives as to justify Mr. Ives in expecting that Mr. Ramsden would care for Mr. Ives's interests, in their transactions.

22. Mr. Ramsden had a fiduciary relationship with Mr. Ives at the time he sold the limited partnerships and annuity discussed herein, and at the time he borrowed the money from Mr. Ives described below.

Investments and Securities Transactions--Generally

23. In March 1989, in connection with opening an investment account for Mr. Ives with Titan Capital, Mr. Ramsden filled out Exhibit 102, a Titan Capital "Client Account Data" form for Mr. Ives. The writing on that form was Mr. Ramsden's, except for the signature by Mr. Ives. (Mr. Ramsden erroneously added the figures, stating a total net worth of $160,000 on that form, while the correct figure was $140,000.)

24. In March 1989 Mr. Ramsden knew that Mr. Ives was 75 years old, and had about $31,000 income per year annually from his investments, pensions and Social Security.

25. In March 1989 Mr. Ramsden also understood that Mr. Ives owned

- no real estate;
- few fixed assets, consisting of a mobile home with a fair market value of about $40,000 but subject to a mortgage of about $15,000, and two vehicles with a total value of about $10,000; and
- liquid assets of about $102,000 in mutual funds and $3,000 cash.

26. In March 1989, when Mr. Ives began dealing with Mr. Ramsden, Mr. Ives's investment objectives were "cash flow—conservative".

27. Mr. Ramsden knew when he began dealing with Mr. Ives

that Mr. Ives's investment objectives were to generate cash flow, with conservative investments.

28. Mr. Ives's liquid assets of about $102,000 had been invested, prior to dealing with Mr. Ramsden, in income-yielding bond funds and cash, consisting of an "IDS Bond Fund", "IDS Cash Management Fund", and "IDS High-Yield Tax Exempt Fund". Exhibits 62-74.

29. Between 1989 and 1993 Mr. Ramsden, as a securities salesperson, sold Mr. Ives the following limited partnership investments:

March 20, 1989	$10,000	Phoenix Leasing Cash Distribution Fund III
March 31, 1989	$10,000	Southwest Oil & Gas Investment Fund VIII
July 20, 1990	$10,000	Windsor Park Properties 6
April 15, 1991	$ 5,000	Southwest Oil & Gas Investment Fund XB
December 29, 1993	$12,150	Texas Keystone Natural Gas Drilling LP.

These purchases of limited partnership interests by Mr. Ives are sometimes collectively referred to below as "the limited partnership investments."

30. The funds to purchase the limited partnership investments were withdrawn by Mr. Ives from his liquid mutual funds account.

31. All of the limited partnership investments were illiquid. Investors did not have the option to withdraw cash at will from their principal investment at will. They were not traded on any exchange and there was no public or organized trading market in them.

32. On September 5, 1992 Mr. Ramsden also sold Mr. Ives an American Skandia annuity for $20,000.

34. Mr. Ramsden, in his capacity as a securities salesperson, brought each of the limited partnership investments, and the Skandia American annuity, to Mr. Ives's attention, and recommended that Mr. Ives purchase each of these investments.

35. Excessive trading. It is a breach of a securities salesperson's duty of due care, and duty of fair dealing, to recommend or engage in, buying or selling investments which are excessive in size or frequency in light of the client's investment objectives and financial and other circumstances ("excessive trading").

36. It is fraudulent for a securities salesperson to recommend or engage in buying or selling investments which are excessive in size or frequency in light of the client's investment objectives and financial and other circumstances, for the purpose of generating commissions for the salesperson.

38. Mr. Ives reasonably relied on Mr. Ramsden's recommendation when he purchased each of the limited partnership investments.

39. All of the limited partnership investments Mr. Ramsden sold to Mr. Ives were speculative.

Texas Keystone Limited Partnership

40. The Texas Keystone Natural Gas Drilling Limited Partnership ("Texas Keystone limited partnership") was the most highly speculative of the limited partnership investments Mr. Ramsden sold to Mr. Ives

41. In order to qualify to purchase the Texas Keystone limited partnership interest, investors were required to have a certain minimum net worth, and level of income.

48. The Texas Keystone Limited Partnership was selling

interests to investors in blocks of $25,000.

49. At the time of his December 29, 1993 purchase of an interest in the Texas Keystone limited partnership, Mr. Ives was 80 years old, and had only about $12,150 remaining in his liquid mutual funds.

50. Mr. Ramsden got permission from the Texas Keystone Limited Partnership to sell a ½ interest to Mr. Ives, because that was all of the cash that Mr. Ives had remaining and available to invest.

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51 The recommendation and sale by a securities salesperson, who as a large part of his business sells limited partnership interests, of an unsuitable limited partnership investment to a client has the capacity to deceive a substantial portion of the public, i.e., those investors relying on the securities salesperson's professional status and expertise.

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Loans by Mr. Ives to Mr. Ramsden, Individually

57. May 1990 Loan ($40,000). On May 11, 1990, to finance his purchase of a house, Mr. Ramsden borrowed $40,000 from Mr. Ives and $30,000 from another individual. Mr. Ramsden did not obtain any financing from a commercial lender for his house purchase.

58. Mr. Ives sold liquid mutual fund shares and gave the cash from that sale to Mr. Ramsden in order to fund the May 1990 loan.

59. The May 1990 loan was evidenced by a promissory note (Exhibit 11), which provided that Mr. Ives was to simply receive in repayment of the note "the same number of shares as were sold", plus reimbursement for the foregone interest on those share during the term of the note. The note also provided that it

- was for a one year term; and
- was secured by a Deed of Trust on Mr. Ramsden's house.

60. Mr. Ramsden did not make interest payments on the 1990

loan. Instead he refinanced the May 1990 loan the following year by executing a promissory note dated May 11, 1991. Mr. Ramsden "paid" Mr. Ives interest on the May 1990 loan by adding $2,000 to the principal amount of the May 11, 1991 promissory note.

61. The $2,000 interest Mr. Ramsden paid Mr. Ives for the $40,000 May 1990 loan amounted to 5% interest annually.

62. At the time of the May 1990 loan the current market rate of interest for mortgage loans was substantially higher than 5%.

63. By borrowing from Mr. Ives rather than a traditional mortgage lender in May 1990, Mr. Ramsden was enriched by (1) avoiding the payment of the "points" and fees which were standard on mortgage loans, and (2) receiving an interest rate substantially below the then-current fair market rate of interest on such loans (estimated to be not less than 10% for a 30-year fixed rate mortgage to qualified borrowers).

64. By loaning $40,000 to Mr. Ramsden in May 1990, Mr. Ives received no greater return than he would have received on the mutual funds in which his money had previously been invested, while (1) his $40,000 became illiquid, and (2) he bore a risk different, and presumably greater than, the risk of his cash and bond mutual fund investments.

65. <u>May 1991 Loan ($72,000). A</u>round February 1991, rather than pay off the May 1990 loan Mr. Ramsden rolled over the $40,000 principal due into a new promissory note to Mr. Ives, dated May 11, 1991 (referred to as the "May 1991 loan"). At the same time Mr. Ramsden borrowed an additional $30,000 from Mr. Ives, to pay off the loan which Mr. Ramsden had borrowed from the second individual in May 1990 to finance his house.

66, Mr. Ramsden executed a new promissory note in favor of Mr. Ives dated May 11, 1990 to cover the $40,000 rollover of his existing debt, the additional $30,000 he borrowed, plus $2,000 for accrued interest on his May 1990 loan, for a total principal amount of $72,000.

67. Mr. Ramsden's May 1991 $72,000 loan was for a 4-year term, maturing in May 1995, and was secured by a Deed of Trust on Mr. Ramsden's house.

70. July 1995 Loan ($86,900). On July 1, 1995, instead of paying off the May 1991 promissory note Mr. Ramsden executed a new note in favor of Mr. Ives.

71. July 1995 promissory note was in an amount equal to the $72,000 principal of the 1991 note, plus unpaid interest which had accrued on the 1991 note, for a total of $86,900.

72. Mr. Ramsden prepared the promissory note evidencing the July 1995 loan.

73. The July 1995 promissory note was on the following terms:

- interest at 8%;
- a maturity date of June 1, 2006 (at which time Mr. Ives would have been 93 years old, if he had lived);
- no acceleration clause.
- the note recited that it was secured by a first Deed of Trust on Mr. Ramsden's house.

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77. An unsecured personal loan by a commercial lender to a borrower with Mr. Ramsden's profile in July 1995 would have carried an interest rate of not less than 12% and more likely around 14%.

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80. At the time of trial Mr. Ramsden was current on his monthly payments to Mr. Ives and Mr. Ives's Estate under the July 1995 promissory note.

81. Mr. Ramsden offered Mr. Ives the opportunity make the May 1991 and July 1995 loans him as investments for Mr. Ives.

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86. Mr. Ramsden also borrowed money from other individuals besides Mr. Ives, including a $30,000 loan from an individual to help buy his house in 1991. Mr. Ramsden did not borrow from any commercial institution to buy his house.

87 Mr. Ramsden's May 1990, May 1991 and July 1995 loans from Mr. Ives occurred in the course of trade or commerce, and in the course of Mr. Ramsden's business.

88. Mr. Ramsden' July 1995 loan from Mr. Ives caused Mr. Ives injury in his business or property, and damaged him by yielding a lower rate of return on his investment than was fair or reasonable under the circumstances.

92. The July 1995 promissory note contains a clause pursuant to which the Promisor (Mr. Ramsden) promises to pay all costs of collection, including reasonable attorneys fees, if the note is not paid when due.

Mr. Ives's Death, and Subsequent Events

93. Mr. Ives died on June 19, 1996.

95 Mr. Ives's son, Jerome C. Ives ("Jerry Ives") was appointed personal representative of Mr. Ives's probate estate on July 9, 1996.

96. Jerry Ives, after being appointed personal representative, investigated into the limited partnership investments purchased by his father from Mr. Ramsden, and determined to sell them.

97. The Estate's liquidation of the limited partnership investments was reasonable necessary for purposes of administering and distributing the Estate.

98. Jerry Ives reasonably inquired into, and attempted to locate, secondary markets in which he could sell the limited partnership interests his father had purchased through Mr. Ramsden.

99. Jerry Ives reasonably inquired of each of the Limited Partnerships themselves, to see if they would purchase their own interests back from his father's estate.

100. Jerry Ives reasonably concluded that his father's estate would benefit the most by selling the limited partnership interests back to each of the respective Limited Partnerships.

101. Jerry Ives, in each instance, sold his father's limited partnership interests back to the limited partnership itself, and in each instance the sale back was at a substantial loss to the principal invested.

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103. In response to a complaint filed by Jerry Ives, the Washington State Department of Financial Institutions, Securities Division, on August 2, 1999 entered a Consent Order, accepted by Mr. Ramsden without admitting or denying the Findings and Conclusions. That Consent Order concluded as a matter of law that in his sales of limited partnership interests to Mr. Ives, and in his loans from Mr. Ives, Mr. Ramsden:

(a) Did not "have reasonable grounds for believing that recommendations for the purchase . . . of a security were suitable;"

(b) Engaged in one or more dishonest or unethical practices by failing to have reasonable grounds for believing that his recommendations to purchase a security were suitable; and

(c) Engaged in one or more dishonest or unethical practices by engaging in the practice of borrowing money from a customer.

Statute of Limitations

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112. This action was filed less than three years after Jerry Ives

was appointed personal representative for Mr. Ives's Estate.

Mandatory Arbitration

114. This action was filed in July 1999.

115. For more than three years after this action was commenced, Mr. Ramsden was represented by counsel

115 Trial of this matter was twice continued, once on the eve of trial because of a conflict with a criminal matter that had priority.

117. Between the filing of this action, and trial in February 2003, the parties engaged in extensive discovery, conducted depositions, and submitted and answered Interrogatories. The parties fully prepared for trial, and plaintiff submitted an extensive ER 904 submission.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY________________
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th of December, 2006, I caused a true and correct copy of the foregoing document to be mailed, postage prepaid, in the U.S. Mail to the following:

Clerk, Court or Appeals, Division II 950 Broadway, Suite 300 MS TB-06 Tacoma, WA 98402	Christopher M. Constantine Attorney at Law P.O. Box 7125 Tacoma, WA 98407-0125

DATED this 15th day of December, 2006.

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Nadine Morin

Appendix 2

NASD Rule 2310—Suitability Rule

2310. Recommendations to Customers (Suitability)

(a) In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

(b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:

(1) the customer's financial status;

(2) the customer's tax status;

(3) the customer's investment objectives; and

(4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

(c) For purposes of this Rule, the term "non-institutional customer" shall mean a customer that does not qualify as an "institutional account" under Rule 3110(c)(4).